United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-6119

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE TITLE GUARANTEE COMPANY, A SUBSIDIARY OF PIONEER NATIONAL TITLE INSURANCE COMPANY, A SUBSIDIARY OF TITLE INSURANCE AND TRUST COMPANY, A SUBSIDIARY OF THE TI CORPORATION (OF CALIFORNIA),

Plaintiff-Appellee,

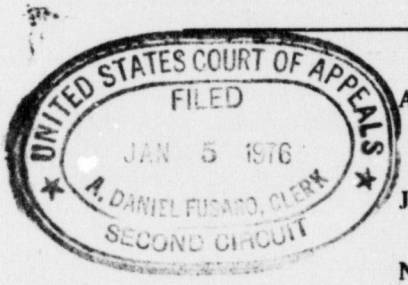
v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

On Appeal From An Order Of The United States District Court
For The Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT



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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-6119

THE TITLE GUARANTEE COMPANY, A SUBSIDIARY OF PIONEER NATIONAL TITLE INSURANCE COMPANY, A SUBSIDIARY OF TITLE INSURANCE AND TRUST COMPANY, A SUBSIDIARY OF THE TI CORPORATION (OF CALIFORNIA),

Plaintiff-Appellee,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant,

On Appeal From An Order Of The United States District Court
For The Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in holding that statements and affidavits obtained during the investigation of unfair labor practice charges were not exempt from disclosure under Section 552(b)(5) and (7)(A), (C), and (D) of the Freedom of Information Act, 5 U.S.C. §552 as amended, 88 Stat. 1561, 1563.

2. Whether the District Court erred in enjoining the National Labor Relations Board from conducting its unfair labor practice hearing pending compliance with the Court's disclosure order under the Freedom of Information Act.

STATEMENT OF THE CASE

This case is before the Court on the appeal of the National Labor Relations Board (hereafter, "the Board") from an order of the District Court for the Southern District of New York requiring disclosure under the Freedom of Information Act, 5 U.S.C. §552, as amended, 88 Stat. 1561 (hereafter "the FOIA"), of affidavits and statements obtained during the investigation of unfair labor practice charges and enjoining the Board from conducting an unfair labor practice hearing pending compliance with the disclosure order. The District Court's Opinion (A. 64-76)[1] was issued by Judge Lee P. Gagliardi and is reported at 90 LRRM 2849.[2] This Court has jurisdiction of the proceeding under 28 U.S.C. 1291 and 1294.

I. BACKGROUND

On May 28, 1975, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America (hereafter, "the Union") filed an unfair labor practice charge (A. 10) in the Board's Second Region ("Region Two").[3]

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[1] "A." references are to the printed joint appendix.

[2] The District Court denied the Board's motion for stay of its order pending appeal (A. 95-100). The Board then filed a motion for a stay in this Court, which motion is still pending decision.

[3] The charge, captioned Case No. 2-CA-13745, was subsequently amended by the Union on June 9, 1975 (A. 12) and June 18, 1975 (A. 14).

The charge was investigated by the Regional Office and on June 30, 1975, Sidney Danielson, Regional Director of Region Two, issued a complaint (A. 15-20) alleging that Title Guarantee Co. (hereafter "the Company") had violated the National Labor Relations Act (hereafter "the Act"). Pursuant to a request for postponement filed by the Company, the hearing on the complaint was rescheduled from September 8, 1975 to October 13, 1975 (A. 21). Thereafter, the hearing was further postponed until October 14, 1975 (A. 22).

By letter of July 2, 1975, to the Regional Director of Region Two, the Company requested, pursuant to the FOIA, that "copies of all written statements, signed or unsigned, contained in the Board's case files . . . be made available for inspection and copying" and that "any such statements taken subsequent to [that] date . . . also be made available" (A. 26-27). Regional Director Danielson, by letter of July 3, 1975, denied the Company's request on grounds that the information was privileged from disclosure by Exemptions 5 and 7(A), (C), and (D) of the FOIA (A. 28-30). The Company filed an appeal from this denial with the General Counsel, dated July 8, 1975 (A. 31-32). On August 1, 1975, the General Counsel denied the appeal for substantially the reasons set forth by Regional Director Danielson (A. 33-34).

II. THE DISTRICT COURT PROCEEDING

On August 5, 1975, the Company filed a complaint in the District Court, pursuant to Section (a)(4)(B) of the FOIA, 5 U.S.C. §552(a)(4)(B), averring that the information sought was required to be disclosed by Section (a)(3) of the FOIA, 5 U.S.C. §552(a)(3), that the "failure and refusal to furnish the requested information was arbitrary and capricious," and that "[i]f plaintiff [did] not receive the requested information a reasonable

time prior to the hearing scheduled for October 14, 1975 in Board Case No. 2-CA-13745, Plaintiff [would] be wrongfully precluded from properly preparing its defense to the allegations contained in the Board's Complaint and [would] thereby suffer irreparable injury for which no adequate remedy at law exists" (A. 7-8). Accordingly, the Company sought, *inter alia*, a mandatory injunction compelling production of the requested statements, a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, and a permanent injunction enjoining the Board from holding its hearing until a reasonable time after it provided the requested statements.

On September 5, 1975, the Board moved in the District Court for dismissal of the complaint, or in the alternative, for summary judgment in its favor (A. 35-37). On September 9, 1975, the Company filed a cross-motion for summary judgment (A. 38-42). The District Court heard oral argument on October 1, 1975, and on October 10, 1975, after an *in camera* inspection of the requested material, the Court granted the Company's cross-motion for summary judgment to the extent that the Board was "directed to turn over the material sought by the plaintiff for inspection and copying forthwith" (A. 76). The Court rejected the Board's contention that its affidavits and statements were privileged from disclosure under Exemptions 5 and 7(A), (C) and (D) of the FOIA, 5 U.S.C. §552(b)(5), (7)(A), (7)(C) and (7)(D). At the same time, the Court granted the Company's request that the unfair labor practice hearing be enjoined (A. 76). The Board moved on October 20, 1975, for a stay of the Court's order pending appeal (A. 78-83). The District Court denied the motion with respect to both the disclosure order and the injunction (A. 95-100).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING DISCLOSURE OF THE BOARD'S AFFIDAVITS AND STATEMENTS

A. The documents are exempt under Exemption 7

1. The Legislative History of Amended Exemption 7

As originally enacted, the FOIA, although containing broad provisions for disclosure of agency documents, also included an exemption from those provisions (5 U.S.C. §552(b)(7)) for:

> investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

The legislative history of this exemption reveals that its purpose was two-fold: to prevent premature disclosure of the results of the government's investigation so that it could present its strongest case in court, and to protect the government's sources of information so that persons having information would feel free to volunteer it without fear of reprisal or invasion of their privacy. See, *Wellman Industries, Inc. v. N.L.R.B.*, 490 F.2d 427, 431 (C.A. 4, 1974), cert. denied, 419 U.S. 834, and cases there cited, including *Frankel v. Securities and Exchange Commission*, 460 F.2d 813 (C.A. 2, 1972), cert. denied, 409 U.S. 889.

However, a series of cases decided by the Court of Appeals for the District of Columbia Circuit in 1973-1974 had the effect of expanding Exemption 7 to include any information contained in a file originally compiled for the purpose of enforcement proceedings, regardless of whether future enforcement proceedings were possible in that case, whether the information was otherwise available to the public, or whether its disclosure

would harm law enforcement activities in other cases. See, *Center for National Policy Review, etc. v. Weinberger*, 502 F.2d 370, 371 n. 1 (C.A. D.C., 1974); *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (C.A.D.C., 1974); *Aspin v. Secretary of Defense*, 491 F.2d 24, 29-30 (C.A.D.C., 1973); *Weisberg v. Department of Justice*, 489 F.2d 1195, 1202 (C.A.D.C., 1973). In response to these cases, Senator Hart offered an amendment, subsequently enacted,[4] which limited Exemption 7, in pertinent part, to:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . .

The following colloquy between Senators Kennedy and Hart makes it clear that the amendment was an attempt to return to the law as it stood before *Weisberg*:

> Mr. Kennedy.
>
> * * *
>
> As a matter of fact, looking back over the development of legislation under the 1966 Act and looking at the Senate Report language from that legislation, it was clearly the interpretation in the Senate's development of that legislation that the "investigatory file" exemption would be extremely narrowly defined. It was so until recent times – really, until about the past few months. It is to remedy that different interpretation that the amendment . . . was proposed.
>
> * * *
>
> Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States, Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

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[4] 88 Stat. 1563 (1974).

* * *

> Mr. Hart. The Senator from Michigan [sic] is correct. That is its purpose. Until 9 or 12 months ago, the courts had approached it on a balancing basis, which is what this amendment seeks to do. 120 Cong. Rec. S9336 (daily ed., May 30, 1974).

Accordingly, the amendment is not a radical departure from prior law, but rather a clarification and enumeration of the governmental interests which Congress had sought to protect in the original Exemption 7. 120 Cong. Rec. S9330 (daily ed., May 30, 1974).[5]

This thesis is confirmed by this Court's decision in *Frankel v. Securities and Exchange Commission, supra,* where the Court, in explaining the purpose of the original Exemption 7, stated:

> If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that prompted the investigation initially or who contributed information during the course of the investigation would be disclosed (*Id.*, 460 F.2d at 817).

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[5] Senator Hart specifically stated that:

> This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

120 Cong. Rec. S9330 (daily ed., May 30, 1974).

These considerations were made explicit in clauses (A), (C), (D) and (E) of the amended Exemption 7.[6]

In Sum, any argument that *Frankel* and the other pre-amendment cases cited *supra*, p. 5, have lost their vitality and no longer constitute compelling precedent is without merit. See *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 163, n. 28 (1975). And as we now show, the intersts which the Board seeks to protect by nondisclosure in this case are precisely those which the courts recognized as falling within the congressional intent of the original Exemption 7 of the FOIA, and which were specifically identified in clauses (A), (C) and (D) of the amended Exemption 7.

2. Disclosure of Board affidavits would "interfere with enforcement proceedings" within the meaning of clause (A) of Exemption 7

One purpose of Exemption 7 as originally enacted was to prevent the defendant in any criminal or civil law enforcement proceedings from obtaining "any earlier or greater access to the government's case than he would have directly in such litigation or proceeding." H.R. Rep. No. 1497, 89th Cong., 2nd Sess., p. 11. See, *Wellman Industries, Inc. v. N.L.R.B.*, *supra*, 490 F.2d at 430; *Wellford v. Hardin*, 444 F.2d 21, 23 (C.A. 4, 1971). Cf. *Renegotiation Board v. Bannercraft Clothing, Inc.*, 415 U.S. 1, 24 (1974). In amending Exemption 7, Congress reaffirmed this intention by providing for nondisclosure of information that would "interfere with

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[6] Exemption 7(E) of the FOIA, 5 U.S.C. §552(7)(E), which protects investigatory records where their production would "disclose investigative techniques and procedures," is not claimed by the Board in this case because it does not apply to routine techniques or procedures which are generally known outside the Government. Conference Report on the 1974 Amendments, Report No. 93-1380, 93d Cong., 2d Sess. (Sept. 25, 1974), p. 12.

enforcement proceedings." The sponsor of the amendment, Senator Hart, reiterated that the amended exemption was intended to "prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. S9329 (daily ed., May 30, 1974). The application of the original Exemption 7 to pending or potential enforcement proceedings he found unexceptionable.[7] Thus, the legislative history of the amendments indicates that Exemption 7(A) continues the prior law with respect to the disclosure of investigatory records in open cases.[8]

Since the object of Exemption 7(A), like its predecessor, is to prevent "premature discovery in an enforcement proceeding," *Wellford v. Hardin*, 444 F.2d 21, 23 (C.A. 4, 1971), it follows that disclosure of the records of a pending investigation is limited to what ordinarily could be discovered by a party to the enforcement proceedings in the course of such proceedings. Thus, in *Williams v. Internal Revenue Service*, 345 F. Supp. 591, 594 (D. Del., 1972), aff'd per curiam, 479 F.2d 317 (C.A. 3, 1973), the court held that investigatory information compiled for use in a matter pending before the Tax Court was exempt from disclosure unless discoverable there. It refused to construe Exemption 7 as embody-

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[7] *Weisberg v. Department of Justice*, 489 F.2d 1195 (C.A.D.C., 1973), and *Aspin v. Secretary of Defense*, 491 F.2d 24 (C.A.D.C., 1973), which created the need for the amended exemption dealt with information contained in the files of closed investigations which had been partially made public. As Chief Judge Bazelon pointed out in dissent (*Weisberg v. Dept. of Justice, supra*, 489 F.2d at 1205), the objectionable feature of the decision is that the government had not shown how disclosure would interfere with law enforcement interests other than the prosecution of those particular matters. Two later decisions, *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (C.A.D.C., 1974) and *Center for National Policy Review v. Weinberger*, 502 F.2d 370, 372 (1974), merely refer to the first two opinions as settled law.

[8] See also Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, pp. 7-8.

ing the discovery procedures of the Federal Rules of Civil Procedure, which did not apply to Tax Court proceedings.

The information requested here was compiled for use in a pending unfair labor practice case. Accordingly here, as in *Williams v. I.R.S., supra,* the information requested is exempt from disclosure. See *Climax Molybdenum Co. v. N.L.R.B.*, ___F. Supp.___ , 90 LRRM 3126 (D. Col., Nov. 14, 1975). For it is well settled that, while the Board has authority under 29 U.S.C. §160(b) to prescribe discovery procedures, it is not required to adopt those of the Federal Rules of Civil Procedure, that its rules do not, in fact, provide for pre-trial discovery,[9] and that litigants in Board proceedings do not have access to affidavits obtained by Board agents in the investigation of a case unless and until the affiant is called to testify in a formal proceeding.[10] See, e.g., *Raser Tanning Corp. v. N.L.R.B.*, 276 F.2d 80, 83 (C.A. 6, 1960), cert. denied, 363 U.S. 830; *N.L.R.B. v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 405-406 (C.A. 7, 1951), cert. denied, 368 U.S. 823; *N.L.R.B. v. Automotive Textile Products Co.*, 422 F.2d 1255 (C.A. 6, 1970); *Intertype Co. v. Penello*, 269 F. Supp. 573 (W.D. Va., 1967), approved *Intertype Co. v. N.L.R.B.*, 401 F.2d 41 (C.A. 4, 1968), cert. denied, 393 U.S. 1049. After the affiant has testified, his affidavit is available for the limited purpose of "examination

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[9] *N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-860 (C.A. 2, 1970), cert. denied, 402 U.S. 915. *Electromec Design and Development Co. v. N.L.R.B.*, 409 F.2d 631 (C.A. 9, 1969); *N.L.R.B. v. Globe Wireless Ltd.*, 193 F.2d 748, 751 (C.A. 9, 1951).

[10] Under the Board's rules, affidavits are only available to a litigant "after a witness called by the General Counsel or the charging party has testified in a hearing upon a complaint . . . ." The rules provide that "the administrative law judge shall, upon motion of the respondent, order the production of any statement . . . of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified [for] examination and use for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1).

[by the respondent] and use for . . . cross-examination". Thus, if a litigant makes a timely request for such statements, he may examine them and use them during cross examination, but he has no absolute right to retain copies of them, unless they are admitted into evidence. See, Section 17380.11, N.L.R.B. Manual, Division of Judges; *Manbeck Baking Co.*, 130 NLRB 1186, 1189-1190 (1961). If an affiant does not testify at the hearing, a litigant is not entitled to production of his statement. See *N.L.R.B. v. Clement Bros., Inc.*, 407 F.2d 1027, 1031 (C.A. 5, 1969).[11]

The reasons for such limited access to affidavits are threefold. In the first place, the General Counsel, under Section 3(d) of the Act (29 U.S.C. §153(d)), is charged with the duty of investigating charges, issuing complaints, and prosecuting such complaints before the Board and enforcing Board orders in the Courts of Appeals. In carrying out this function, he must be able to present his strongest case to the Board and the courts. Thus, like a U.S. attorney in a criminal case, he must be able to keep confidential information which might enable suspected violators of the Act to learn his case in advance and frustrate enforcement proceedings or construct defenses which would permit violations to go unremedied.

Second, employees who are interviewed may be reluctant, for fear of incurring their employer's displeasure, to have it known that they gave information against him to the Board (see, e.g., *Wellman Industries, Inc. v. N.L.R.B., supra,* 490 F.2d at 430; *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 763 (C.A. 6, 1965) and cases cited therein). Similarly, non-employees who are interviewed may have equally strong reasons for not wishing their

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[11] The Board's Rules and Regulations, 29 C.F.R. 102.118(b)(1), thus in effect, incorporate the Jencks Act (18 U.S.C. §3500), subsection (a) of which "manifests the general statutory aim to restrict the use of such statements to impeachment." *Palermo v. United States,* 360 U.S. 343, 349 (1959).

names or the information they have given to be revealed.[12] For instance, a non-employee union official might volunteer to the Board important information which he or she would be reluctant to make known to the company for fear of jeopardizing the collective-bargaining relationship or compromising the union's position in negotiations. If the Board is unable to protect this information from premature disclosure, its ability to investigate further unfair labor practice charges will be seriously impaired. See Part 4, *infra*, pp. 16-20.

Finally, affidavits such as those involved here constitute an attorney's work product. *Hickman v. Taylor*, 329 U.S. 495, 514 (1947); *N.L.R.B. v. Laborers, Local 1140*, 78 LRRM 2635 (C.A. 8, 1971); *N.L.R.B. v. Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 289-290 (C.A. 2, 1950), cert. denied, 342 U.S. 812. As recognized by the Court in *Hickman v. Taylor*, *supra*, proper preparation for litigation requires extensive investigative work, including the taking of statements. The protection of such statements from the "free scrutiny" of opposing counsel is necessary in order to insure that trial preparation may be conducted in an effective manner, free of restrictions and inhibitions. As the Court observed (*id.*, 329 U.S. at 511):

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thought, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

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[12] See, e.g. *United States v. Northside Realty Associates*, 324 F. Supp. 287, 295-296 (N.D. Ga., 1971).

In sum, as the cases cited above indicate, the courts have approved the Board's practice of not allowing pre-trial discovery that would disclose the names, addresses, and statements of persons interviewed by Board agents. Clearly, the Company's purpose in bringing this action was to obtain earlier access to the affidavits in the investigatory file in Case No. 2-CA-13745 than it would have under the Board's normal procedures. However, as shown, the express purpose of Exemption 7(A) of the FOIA, like the original Exemption 7,[13] was to preclude an opposing litigant from obtaining "earlier or greater access to investigation files than he would otherwise have." 120 Cong. Rec. S9329 (daily ed., May 30, 1974) (Remarks of Senator Hart). Use of the FOIA to change the Board's rules respecting discovery in ongoing unfair labor practice proceedings on either a wholesale or a document-by-document basis would thus plainly "interfere with enforcement proceedings", in derogation of both Exemption 7(A) and the Board's statutory responsibilities. *Climax Molybdenum Co. v. N.L.R.B., supra;* cf. *Renegotiation Board v. Bannercraft Clothing, Inc.*, 415 U.S. 1, 24 (1974). Accordingly, the District Court erred in holding that the material at issue in this case was not protected from disclosure by Exemption 7(A) of the FOIA. The Court failed to recognize that, irrespective of its view as to the contents of a particular affidavit (see A. 74), Exemption 7(A) was intended to preclude a respondent to a Board proceeding from obtaining earlier or greater access to a potential witness' affidavit than it would have gained under the Board's normal procedures.

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[13] Affidavits obtained by Board agents during their investigation of unfair labor practice charges or objections to a Board conducted election were uniformly held to be exempt from disclosure under the original Exemption 7 of the FOIA. *Wellman Industries, Inc. v. N.L.R.B., supra.* See also, *Clement Bros., Inc. v. N.L.R.B.*, 282 F. Supp. 540, 542 (D.C. N.D. Ga., 1968), approved, *N.L.R.B. v. Clement Bros., Inc.*, 407 F.2d 1027, 1031 (C.A. 5, 1969); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593-594 (D. P.R., 1967), cited with approval, *Bristol Myers v. F.T.C.*, 424 F.2d 935, 939 (C.A.D.C., 1970), cert. denied, 400 U.S. 824.

3. Disclosure of the affidavits would constitute an unwarranted invasion of personal privacy within the meaning of clause (C) of Exemption 7

Under Exemption 6 of the FOIA, Congress has protected personnel, medical, and similar files from "clearly unwarranted invasion of personal privacy." "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy . . . [involving] a balancing of interests." Senate Report No. 813, 89th Cong., 1st Sess., 9 (1965). In order to determine the extent to which invasions of personal privacy are warranted under Exemption 6, Congress "requires a court . . . to balance the right of privacy of affected individuals against the right of the public to be informed; and the statutory language 'clearly unwarranted' instructs the courts to tilt the balance in favor of disclosure." *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (C.A.D.C., 1971). However, "the invasion of privacy caused by disclosure would be 'clearly unwarranted', even though the invasion of privacy . . . is not as serious as . . . in other cases," if the party seeking disclosure has failed to assert a "public interest purpose for disclosure" as opposed to a private interest. *Wine Hobby U.S.A., Inc. v. United States Internal Revenue Service*, 502 F.2d 133, 137 (C.A. 3, 1974).

In addition, Congress, borrowing from Exemption 6, added clause (C) to Exemption 7 to prevent any "unwarranted invasion of personal privacy" which might be occasioned by the production of investigatory records. The legislative history demonstrates that Congress intended to apply the balancing test of Exemption 6, but also intended to afford greater protection for personal privacy. Thus the amendment of Exemption 7, as originally proposed, provided only "the protection for personal privacy included in . . . the sixth Exemption" (120 Cong. Rec. S9330 (Remarks of Senator Hart) (daily ed., May 30, 1974))—that is, protection

against "clearly unwarranted" invasions.[14] However, in response to President Ford's objection that this language did not sufficiently protect personal privacy,[15] Congress deleted the word "clearly." 120 Cong. Rec. S17830 (Remarks of Senator Kennedy) (daily ed., October 1, 1974). This deletion is significant, since it not only insures that the balancing of interests will not be unduly tilted against privacy (cf. *Getman v. N.L.R.B.*, *supra*, 450 F.2d at 674), but also evidences an increasing congressional concern with the protection of personal privacy. See *Deering Milliken, Inc. v. N.L.R.B.*, ___ F. Supp. ___, 90 LRRM 3138, 3147 (D. S.C., Nov. 12, 1975). The depth of this concern is apparent from Congress' concurrent consideration and recent adoption of the Privacy Act of 1974, Public Law 93-579 (88 Stat. 1896, *et seq.*), which became effective in September 1975.

In Board proceedings, the privacy rights of the affiants and other persons that may be mentioned in their affidavits must be balanced against the plaintiffs' need to obtain the affidavits. If an individual can be said to possess a right to privacy it must include the right to select the people to whom he will communicate his ideas.[16] Here, the affiants' rights to privacy,

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[14] Senator Hart explained that, "[b]y adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh. I wish also to make clear, in case there is any doubt, that this clause is intended to protect the privacy of any person who is mentioned in the requested files, and not only the person who is the object of the investigation." 120 Cong. Rec. S9330 (May 30, 1974).

[15] In a letter to Congress, President Ford stated that "an individual's right to privacy would not be appropriately protected by requiring the disclosure of information in any investigatory file about him unless the invasion of the individual's privacy is clearly unwarranted . . ." 120 Cong. Rec. S17829 (daily ed., October 1, 1974).

[16] See, e.g. Sec. 2(b)(2) of the Privacy Act of 1974 (88 Stat. 1896), which provides that "The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as other-

(continued)

as well as the rights of any persons mentioned in their affidavits, would be seriously diminished if disclosure of their affidavits is required in circumstances other than those set forth in section 102.118 of the Board's Rules and Regulations, 29 C.F.R. 102.118. Production would force a communication by the affiants to the plaintiffs simply because they chose to make statements in confidence to a government agency.

The Company has demonstrated no need to have copies of the statements which would outweigh the affiants' privacy rights. Nor has it asserted any public interest in production of the affidavits upon which the invasion of the affiants' privacy could be deemed warranted. *Wine Hobby U.S.A., Inc. v. United States Internal Revenue Service, supra,* 502 F.2d at 137. Indeed, the only reason for the Company's request – pre-trial discovery – was clearly not an objective of the FOIA (See discussion, *supra,* Part 2). Accordingly, the affidavits are protected from disclosure under Exemption 7(C) of the FOIA.

4. Disclosure would reveal the identity of confidential sources within the meaning of clause (D) of Exemption 7.

It has long been recognized that effective law enforcement requires that the Government be able to encourage citizen cooperation by assuring that the identity of informers will remain confidential at least until the informer's testimony is required in court. As the Supreme Court stated in *Roviaro v. U. S.,* 353 U.S. 53, 59 (1957):

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16 (continued)
wise provided by law, to permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent."

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Case citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

While this pronouncement occurred in a criminal case, the principle has general application.[17] *Machin v. Zuchert,* 316 F.2d 336, 339 (C.A.D.C., 1963), cert. denied, 375 U.S. 896; *Wirtz v. Rosenthal,* 388 F.2d 290 (C.A. 9, 1967). And, as shown above, the Board's procedures incorporate this privilege by preserving the confidentiality of informants and information furnished by them unless and until they are called as witnesses in a formal proceeding.

While the original Exemption 7 did not specifically allude to the informer's privilege, its inclusion therein was implicit in view of the legislative purpose of that exemption, and the courts so concluded. *Evans v. Department of Transportation of United States,* 446 F.2d 821, 823-824 (C.A. 5, 1971); *Wellman Industries, Inc. v. N.L.R.B., supra; Rural Housing*

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17 "In enforcing laws that make certain conduct unlawful such as the anti-trust laws, the Fair Labor Standards Act, and the civil rights laws, the courts have recognized that the government must retain the confidence of its sources of information. In these cases, the courts have refused to require the disclosure of the names of informants on the basis of a qualified privilege." *United States v. Northside Realty Associates,* 324 F. Supp. 287, 295 (N.D. Ga., 1971).

Alliance v. United States Department of Agriculture, 498 F.2d 73, 82 (C.A.D.C., 1974); *Barceloneta Shoe Corporation v. Compton, supra*, 271 F. Supp. at 593-594 (D. P.R., 1967); *Clement Bros. Inc. v. N.L.R.B.*, 282 F. Supp. 540 (N.D. Ga., 1968). In amending Exemption 7, Congress, explicitly approving this established case law, included clause (D) to protect the confidentiality traditionally accorded Government sources of law enforcement information. Senator Hart, the amendment's sponsor, made clear that this clause was designed to protect "without exception and without limitation the identity of informers . . . [whether they] be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." 120 Cong. Rec. S9330 (daily ed., May 30, 1974). Thus, Congress specifically provided that nondisclosure of investigatory records is appropriate under the amended FOIA in order to protect both governmental and individual interests in confidentiality, i.e., "(1) encouraging cooperation by those who are not obligated to provide information to the government and (2) protecting the rights of those who must." *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 769 (C.A.D.C., 1974). As the Conference Report on the new amendments states (Report No. 93-1380, 93d Cong., 2d Sess. (Sept. 25, 1974) at p. 13):

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes – either civil or criminal in nature – the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information.

This explanation clearly indicates that Exemption 7(D) applies not only where an express assurance of confidentiality was given,[18] but also where such an assurance could be reasonably inferred. *Kaminer v. N.L.R.B.* ___ F. Supp. ___, 90 LRRM 2269, 2271 (S.D. Miss., 1975).

Thus, in *Kaminer,* the court, in considering a request for affidavits obtained in a Board investigation which did not result in issuance of complaint held that (*id.*, at 2272):

> . . . this is also a case in which 'common sense' dictates that the Board is required to maintain the confidentiality of its informers. The Board's investigatory function depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known. Thus, the Board must be permitted to maintain the confidentiality of its sources. Exemption 7(D) of the newly amended FOI Act recognizes this necessity.

Similarly, other courts have recognized that an employer's power over his employees' jobs is a significant restraint on their willingness to cooperate with the Board's agents. See, e.g. *N.L.R.B. v. Wellman Industries, Inc., supra,* 490 F.2d at 430; *N.L.R.B. v. National Survey Service, Inc.,* 361 F.2d 199, 206 (C.A. 7, 1966); *Surprenant Mfg. Co. v. N.L.R.B.,* 341 F.2d 756, 763 (C.A. 6, 1965); *Texas Industries, Inc. v. N.L.R.B.,* 336 F.2d 128, 133-134 (C.A. 5, 1964). As the Court stated in *National Survey Service, supra,* 361 F.2d at 206:

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[18] Section 10058.4 of the NLRB Case Handling Manual, Part 1 provides in pertinent part:

> As for the confidential nature of [a witness'] information, he should be told the truth – that the information would be used by us in ascertaining the total picture and that this would be its only use unless and until he might be called on to give his information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information.

> Statements made during an investigation to Board agents may and often do reveal an employee's and his co-workers attitudes and activities in relation to a union and their employer. If an employee knows that the statements made by him will revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement, a circumstance complicating a determination of the actual facts in a labor dispute.

As shown, Part 2, *supra*, union officials who give information to the Board also may be reluctant to have their identify disclosed for fear of jeopardizing their relationship with the employer and thereby upsetting the stability of the collective-bargaining relationship. In investigating refusal-to-bargain charges, the Board relies heavily upon information furnished by the negotiators themselves. As some of this information is subjective in nature, the parties giving it would be understandably reluctant to have their identity revealed.

Thus, if the Board were required to disclose the identity of its sources of information, its ability to obtain information in the future, from employees and non-employees alike, would be severely impaired. Accordingly, the Board's refusal to turn over any affidavits within its possession in order to maintain the confidentiality accorded to its sources of information was privileged under Exemption 7(D).

B. The documents are exempt under Exemption 5

Exemption 5 of the FOIA (5 U.S.C. §552(b)(5)) exempts from disclosure:

> inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency;

It exempts "those documents . . . normally privileged in the civil discovery context" *N.L.R.B. v. Sears, Roebuck & Co., supra,* 421 U.S. at 146-149. "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context . . . ." *Renegotiation Board v. Grumman Aircraft Corp.,* 421 U.S. 168, 184 (1975). These privileges include the "executive privilege" for predecisional memoranda which reflect the agency's deliberative processes, and the "attorney work-product privilege." *Sears, supra,* 421 U.S. at 150-152, 153-154. As shown, p. 12, *supra,* the affidavits and statements which result from Board agents' interviews are part of an attorney's work product.[19] See also, *State ex. rel. Dudek v. Circuit Court for Milwaukee County,* 34 Wis.2d 559, 150 N.W.2d 387 (1967), cited by the Supreme Court in *Sears, supra* at 154. As an attorney's work product, prepared in anticipation of trial and reflecting the attorney's line of questioning, affidavits are thus privileged from disclosure by Exemption 5. Moreover, Board affidavits serve the additional purpose of assisting the General Counsel, or his agent, the Regional Director, in making the administrative determination of whether issuance of complaint is warranted. In this respect, affidavits also constitute a part of the deliberative process protected by the Government's

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[19] In *Hickman, supra,* the Supreme Court found that the privilege accorded an attorney's work product was a qualified privilege, and that such material could be obtained upon a showing of special need. However, in *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975), the Supreme Court observed that the test for determining whether documents come within the coverage of Exemption 5 is whether they would "normally be protected in the civil discovery context," since "it is not sensible to construe the [FOI] Act to require disclosure in the hypothetical situation in which the private party's claim is most compelling," 421 U.S. at 149, n. 16. Since, as shown, affidavits are normally privileged from disclosure in a civil discovery context under the *Hickman* rationale, plaintiff's assertions of need are irrelevant.

Moreover, since the attorney work product privilege protects the compilation of facts no less than legal analysis, the court below erred in finding (A. 69-71) Exemption 5 inapplicable here because the affidavits sought were factual.

"executive privilege" which is incorporated in Exemption 5. See *Brockway v. Department of the Air Force*, 518 F.2d 1184 (C.A. 8, 1975).

II. THE DISTRICT COURT ERRED IN ENJOINING THE BOARD'S HEARING

The District Court ruled that the Company would be irreparably harmed if the requested material was not disclosed prior to the Board's unfair labor practice hearing (A. 76). However, as we show below, such "harm" is not irreparable because claims, on whatever grounds, that a litigant in a Board hearing has been denied due process are properly remedied through the review procedures set out in Sections 10(e) and 10(f) of the National Labor Relations Act (hereafter "N.L.R.A."), 29 U.S.C. §160(e) and (f); and the mere necessity of pursuing these remedies does not itself constitute sufficient injury to permit a litigant to invoke the aid of the district courts. Moreover, as we further show, this long-settled rule has not been changed by the enactment of the FOIA; for rights to disclosure under that statute have no connection with one's needs as a litigant in an agency proceeding.

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-49 (1938), the Supreme Court held that district courts lacked authority to enjoin Board hearings because the review procedures provided for in the N.L.R.A. were the exclusive means of remedying any harm resulting from irregularities in Board proceedings and because those procedures afforded "adequate opportunity to secure judicial protection against arbitrary action . . . ." See also *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54 (1938). The *Myers* Court further held that the mere necessity of having first to litigate charges in a Board hearing before securing judicial review in the appropriate forum, i.e. the federal appellate courts, did not constitute irreparable harm. *Id.* at 50-51.

It is now well established that the statutory review procedures set forth in Section 10(e) and (f) of the N.L.R.A. provide the exclusive means of raising claims, such as those made here by the Company, of prejudice in preparing a defense because of the Board's restrictions on discovery. See, e.g., *Sears, Roebuck & Co. v. N.L.R.B.*, 433 F.2d 210, 211 (C.A. 6, 1970); *Polymers, Inc. v. N.L.R.B.*, 414 F.2d 999, 1005-1006 (C.A. 2, 1969), cert. denied, 396 U.S. 1010; *Vapor Blast Mfg. Co. v. Madden*, 280 F.2d 205, 209 (C.A. 7, 1960), cert. denied, 364 U.S. 910; *Intertype Co. v. Penello*, 269 F. Supp. 573, 576 (W.D. Va., 1967). See also *Bokat v. Tidewater Equipment Co.*, 363 F.2d 667 (C.A. 5, 1966).[20] For instance, in *Vapor Blast Mfg. Co. v. Madden, supra*, a case very similar to the instant one, an employer subject to unfair labor practice proceedings before the Board requested the district court to issue an order enjoining Board hearings and a declaratory judgment declaring the employer's right to inspect employee affidavits obtained by Board agents during the course of their investigation. The Court refused to grant the relief requested stating, *inter alia* (280 F.2d at 208, 209):

> The review provisions of the Act, 29 U.S.C.A. §160(e) and (f) provide adequate and full opportunity for the Company to raise the contentions it tendered in its complaint in the district court. Under the provisions of Section 10(e) of the Act, in an enforcement proceeding the Company may put

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[20] However, the Board denies that the Company will suffer any prejudice in preparing its defense without prior access to the requested material. As noted *supra* n. 10, the affidavits of individuals who testify at the Board's hearing will be made available at that time for the purpose of cross-examination. If the Company is surprised, or feels that it has been somehow prejudiced, the Administrative Law Judge can make any necessary accommodation to give the Company adequate time for preparation. In this regard, the District Court has already determined that the Company "would not require a substantial period of time to review the material and adequately prepare for the Board proceedings" (A. 97).

> in issue the question of whether it was deprived of its rights to procedural due process by the Board action to suppressing the documents in question.
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> * * *
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> . . . [M]erely raising a constitutional issue in its complaint for declaratory judgment, when full appellate review of the administrative proceedings is available and in the absence of any extenuating circumstances, is insufficient to give the district court jurisdiction over the subject matter in the face of the well-established doctrine of exhaustion of administrative remedies . . . .

In short, a litigant before the Board cannot demonstrate that it will suffer irreparable injury by proceeding to an unfair labor practice hearing without the benefit of agency documents of which it seeks production, since it has means of obtaining Board and court review of any prejudice which it may have suffered as a result of its failure to obtain the requested documents.

Although the FOIA confers jurisdiction on district courts to review agency refusals to disclose documents requested pursuant to that Act, it does not alter this long-established rule precluding district courts from enjoining Board proceedings pending resolution of requests for documents or information allegedly necessary for successful participation in such proceedings. That Act was not intended to operate as a pre-trial discovery device in agency proceedings.[21] As the Supreme Court recently stated in *N.L.R.B. v. Sears Roebuck & Co., supra,* 421 U.S. at 143 n. 10 (1975):

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[21] To the contrary, Senator Hart, the sponsor of the 1974 amendments to the FOIA, made it clear that the purpose of both the original Exemption 7 and the newly enacted Exemption 7(A) was to "prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. S 9330 (daily ed., May 30, 1974).

> Sears' rights under the [Freedom of Information] Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. *EPA v. Mink*, 410 U.S. 73, 79, 92 (1973); *Renegotiation Board v. Bannercraft Clothing*, 415 U.S. 1, 24 (1974). Accordingly, we will not refer again to Sears' underlying unfair labor practice charge.

In *Renegotiation Board v. Bannercraft Clothing, et al.*, 415 U.S. 1 (1974), the Supreme Court held that the lower court had erred in enjoining proceedings before the Renegotiation Board pending resolution of the plaintiffs' request for production of documents under the Freedom of Information Act. The reasons for so holding were as follows: (1) prior to the enactment of the Information Act, the Supreme Court had consistently held that such proceedings were not to be enjoined prior to the exhaustion of the administrative process (415 U.S. at 20-22); (2) "[s]eeking injunctive relief during the pendency of such proceedings encourages delay through resort to preliminary litigation over an FOIA claim" (415 U.S. at 23); (3) the decision of the administrative agency does not impose any obligation on the parties until termination of further court proceedings, and thus the injury suffered, absent an injunction, is simply that of being unsuccessful in the initial administrative stages and the litigation expense, which does not constitute irreparable injury (415 U.S. at 23-24);[22] and (4) "Interference with the agency proceedings opens the way to the use

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[22] As the Court stated (*ibid.*):

> Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52; Jaffe Judicial Control of Administrative Action, 429 (1965). Without a clear showing of irreparable injury, see

(continued)

of the FOIA as a tool of discovery, see *Sears, Roebuck and Co. v. N.L.R.B.*, 433 F.2d 210, 211 (C.A. 6, 1970), over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings . . . . Discovery for litigation purposes is not an expressly indicated purpose of the Act" (415 U.S. at 24).

We submit that all of the above considerations are equally applicable in Labor Board proceedings. Thus, as shown above, the courts, including the Supreme Court, have always held that Board unfair labor practice proceedings should not be enjoined prior to the exhaustion of the administrative process. Seeking injunctive relief during Labor Board proceedings encourages delay just as much as it does in Renegotiation Board proceedings. Plaintiff has an adequate judicial remedy under the Act, and will suffer only litigation expense in pursuing it, which does not warrant injunctive relief.[23] And finally, interference with the Board's proceedings would permit plaintiff to use the FOIA as a tool of discovery over and beyond that provided in the Board's rules. See discussion, *supra*, Part 2.

In brief, it is evident that *Bannercraft* is controlling here. Thus, in *Sears Roebuck & Co. v. N.L.R.B.*, 473 F.2d 91, 93 (C.A.D.C., 1972),

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[22] (continued)
Virginia Petroleum Jobbers Ass'n. v. FPC, 104 U.S. App. D.C. 106, 111, 259 F.2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process. *Myers, supra, Sears, Roebuck & Co. v. N.L.R.B.*, __ U.S. App. D.C. __, __, 473 F.2d 91, 93 (1973) [cert. denied, 415 U.S. 950].

[23] This is not to say that no injunctive relief would ever be proper in an FOIA suit. If irreparable injury to rights under the FOIA (as opposed to injury to interests as a litigant in an agency proceeding) were threatened it would be a different matter. For example, if the destruction of documents at issue were somehow threatened before a court could consider whether they should be disclosed, then an injunction might properly issue to protect plaintiff's potential disclosure rights. However, there is no basis for any such allegation in the present case, since the conduct of a Board hearing in no way threatens the existence of the documents.

cert. denied, 415 U.S. 950, the Court of Appeals summarily reversed a district court order enjoining an unfair labor practice proceeding until Sears' FOIA request was ruled on, stating that:

> It may be that Sears will be held entitled to the documents under the Information Act, and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order.

Accord: *Deering Milliken, Inc. v. N.L.R.B., supra,* 90 LRRM at 3149; *General Cigar Co., Inc. v. Nash,* ___F. Supp. ___, 89 LRRM 2863 (D.D.C., 1975); *Safeway Stores, Inc. v. N.L.R.B.,* 84 LRRM 2536, 2538 (D.D.C., 1973). See also *Sears Roebuck & Co. v. N.L.R.B.,* 433 F.2d 210, 211 (C.A. 6, 1972).

It is therefore respectfully submitted that the FOIA has made no change in the well-settled principles precluding district courts from enjoining Board proceedings. Under those principles, the Company will not suffer irreparable injury, since it possesses an adequate remedy at law through statutory review of the Board's decision by the Court of Appeals. Accordingly, the request for injunctive relief was erroneously granted.

CONCLUSION

For the foregoing reasons, we submit that the District Court's order requiring the Board to produce affidavits and statements and enjoining the Board from proceeding with its unfair labor practice hearing was erroneous and should be reversed.

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December, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE TITLE GUARANTEE COMPANY, A SUBSIDIARY OF PIONEER NATIONAL TITLE INSURANCE COMPANY, A SUBSIDIARY OF TITLE INSURANCE AND TRUST COMPANY, A SUBSIDIARY OF THE TI CORPORATION (OF CALIFORNIA),	:	
Plaintiff-Appellee,	:	
v.	:	No. 75-6119
NATIONAL LABOR RELATIONS BOARD,	:	
Defendant-Appellant.	:	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Plt. Robert Lewis, Esquire
Jackson, Lewis, Schnitzler
& Krupman
261 Madison Ave.
New York, N.Y. 10016

Dated at Washington, D.C.

this 31st day of December, 1975.

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD